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WHAT IMMEDIATE PRACTICAL CONTRIBUTION CAN PSYCHIATRY MAKE TO CRIMINAL LAW ADMINISTRATION?

BY

WINFRED OVERHOLSER, M. D.,

ASSISTANT COMMISSIONER OF MENTAL DISEASES, COMMONWEALTH OF MASSACHUSETTS.

A well-known psychiatrist recently made the following statement concerning the relation of psychiatry to the criminal law:

> In the practical application of psychiatry to problems of criminal law, the prevalent concepts of tradition and long usage conflict sharply with psychiatric attitudes. Popular theories of retribution and established methods of dealing with offenders almost entirely prevented a scientific envisagement of crime until recently when psychiatrists, in spite of their original limitation of field, discovered and demonstrated that types and trends of abnormal psychology extended far out from the asylum into the court-room, school and home. Psychiatric experience and technique were found equally applicable to the irascible employee, the retarded school child, the persistent stealer, the compulsive drinker, the paranoid murderer, and textbook cases of epilepsy, melancholia and schizophrenia. Faced with the legal partitions of misbehavior into "insane" and "criminal," psychiatrists found themselves with no technical interest in nor agreement with these partitions, but with a driving concern in all the unpropitious trends of human character, with all acts, thoughts, emotions, instincts and adaptations, either socially or individually adverse. Some of these constitute committable "insanity," some of them do not; but all of them are psychiatric problems.

As the antithesis to this picture let me quote to you from a fairly recent book by a well-known judge:

> More solemn nonsense is being said and written concerning the mentality of criminals than upon any other discussed subject. Mankind worships wondermakers. The fortune teller, the voodoo man, the prophet of the marvelous find followers in all lands, through all ages. No fakir is quite successful who does not more than half believe in himself. Also everyone stands for the excelling importance of his own calling. Even the professional second-story climber will put up an argument to justify his business. The self-styled practical psychologists, who dabble in the prisons and fret the courts, are neither more nor less than, five times out of six, lineal descendants of the women who told fortunes with cards. The practical psychologists are, in the main, honest in their belief, while the fortune tellers only half believe in themselves. Notwithstanding their general sincerity the first named will often fake a little to avoid being unjustly beaten on a point. A good many officials in charge of courts, prisons and parole boards, work under the influence of their doctrine, that crime is a result of mental deficiency. A more dangerous and pernicious teaching could not invade the prison or the court room.

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I have taken the liberty of presenting these quotations at length to illustrate what is probably to you a familiar fact, that upon this subject of the relationship of psychiatry to the criminal law there are two markedly opposing attitudes. The fact that there is such a clash of opinion on this subject forces one to the conclusion that the truth probably lies somewhere between the two extremes stated. It is my purpose at this time to present to you what I believe to be a fair and moderate statement of the position of American psychiatry. I shall hope to satisfy you that psychiatry is capable of making a practical contribution to the administration of the criminal law, and that perhaps on this subject the law and medicine are not quite so far apart as some would have us believe. No attempt will be made to dogmatize; psychiatry is a young science, and dogma certainly has no place if we are really seeking for the truth. May I say at this time that it is most gratifying to find a representative group of students of the law interested in the possibilities of assistance from this specialty of medicine. It has been my privilege to work with your Committee on Psychiatric Jurisprudence and I wish to testify at this time to the serious and sympathetic spirit of truth seeking in which your committee has worked. The resolutions[1] which were adopted by this Section at the meeting in Memphis last year represented long study and marked this Section and the American Bar Association as progressive and fearless. The final word has not been spoken, however, and study should continue. The fact that study is being carried on cooperatively through the official action of great national organizations such as the American Bar Association, the American Medical Association and the American Psychiatric Association, augurs exceedingly well for the future of the criminal law.

Psychiatry, that branch of medicine which deals with mental disorder and with abnormal behavior, is young; its extension from within the walls of mental hospitals into the community has taken place since the turn of the century and markedly since the close of the World War. This, however, does not mean that the psychiatrist has not played his part in criminal law for a relatively long period. Expert witnesses we are told date from probably the 14th century and certainly from that time insanity

[1] Reports of American Bar Association, Vol. 54, p. 56.

AUG 24 1931
Author

existing at the time of the offense has been recognized as a defense to the charge. Many, however, have been the so-called "tests of insanity" and stormy has been the history of expert testimony. The expert was probably a well recognized and respected figure in court until about the latter part of the 18th century, when with the increase of the powers of the jury he degenerated into a partisan witness. When he was a friend of the court, he was entitled to respect, for no stigma was then attached to him by reason of his being a partisan. It seems entirely safe to say that it was this change which was responsible for his disrepute, a disrepute from which he still suffers. Almost as interesting as the historical development of expert testimony, however, is the history of the so-called "tests of insanity." It was, presumably, necessary, law being what it is, to lay down certain general rules to which the specific case must conform. It was but natural, too, that these tests should reflect the prevailing conceptions of psychology. One regret of the psychiatrist today is, however, that the tests have not kept pace with the progress of psychological science. I need only mention to you the so-called "wild beast" test, the "child of 14" test, the doctrine of "partial insanity," the concept of "good and evil," the doctrine of delusion as the *sine qua non* and finally the "right and wrong" test laid down in the M'Naughten Case.[2] Although the latter case is generally referred to as the prevailing law today, it may be mentioned in passing that many judges in attempting to interpret it have apparently failed to comprehend its full significance, with the result that the whole concept of criminal responsibility today is in a disordered state. This disorder has not been at all relieved by the so-called "irresistible impulse" doctrine which as Dean Pound has pointed out was an entirely logical addition but which has succeeded in merely adding to the confusion. I commend to you the reading again of Sir James Stephen's criticism of the M'Naughten opinion.[3] A further difficulty has been the general legal doctrine was that a defendant must be either sane or insane, the difficulty of this

[2] See S. Glueck, "Mental Disorder and the Criminal Law," Chapters 5-7, Little, Brown & Co., Boston, 1925.
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INTENTIONAL SECOND EXPOSURE

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AUG 24 1931

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being that no borderzone was recognized by the law, although the existence of such a zone, sometimes a wide one, has been long recognized by medicine. The New York Supreme Court in 1928, however, in the case of People *vs.* Moran [4] appeared to recognize such a borderline condition. It stated: "Feebleness of mind or will, even though not so extreme as to justify a finding that the defendant is irresponsible, may properly be considered by the triers of the fact, in determining whether a homicide has been committed with a deliberate and premeditated design to kill, and may thus be effective to reduce the grade of the offense." From a legal point of view this may bring about further complications but at least it appears to be in line with psychiatric doctrine.

The necessity of answering categorically questions based upon these tests and the fact that their testimony was subject to suspicion because they were introduced by the parties to the case have been two of the factors which have made expert witnesses somewhat suspected. The words once used by the Supreme Court of the United States to the effect that "opposite opinions of persons professing to be experts may be obtained to any amount" [5] may appear to be true, but the fault does not lie wholly with the expert. The hypothetical question has caused much beclouding of the minds of the jury and has prevented the expert from answering the question to his own satisfaction and explaining the facts and their significance. But whether the fault is that of the expert or not, the fact remains that in the minds of the public, of the jury, and unfortunately of the courts as well, there has arisen a widespread impression that the testimony of experts is to be taken with great caution. As a matter of fact, in many cases it has been disregarded entirely by the jury on account of the apparent conflict. This has been especially true of psychiatric expert testimony for several reasons. It has been used at times in cases where the facts as to the offense were clear, so that insanity constituted the only possible defense. These were crimes often of an unusually shock-

[4] 249 New York 179. See for discussion, H. Weinhofen, "Partial Insanity and Criminal Intent." 24 Illinois Law Review 505 (January, 1930).
[5] Winans *vs.* New York & Erie R. R. Co., 21 Howard 88 (at 101).

ing or hideous type which attracted much public attention and desire for revenge. Thus undue attention has been focused on these cases, and there has been no inclination on the part of the public to sympathize with any attempt to explain or mitigate the motives of the crime. As a matter of fact the number of cases in which the defense of insanity has been adduced has been comparatively small, yet in the minds of the public there seems to remain a very firmly fixed idea that they are numerous and that the services of experts are prostituted in the majority of them.

In any event and for whatever reason, it is certain that the status of expert testimony is and has been for a long time unsatisfactory. Various remedies therefore have been sought and tried. One expedient which has been tried has been the appointment of experts by the court. Theoretically at least this does away with the onus of partisanship and should result in a neutral and unbiased report. Objection has been made that this procedure gives undue weight to the evidence of the courts' experts and that much weight may militate against the defendant. This objection has been sustained in Illinois,[6] and the same procedure for another reason has been declared unconstitutional in Michigan.[7] In Kansas [8] and Virginia,[9] at least, however, as well as in North Carolina [10] the right of the court has been sustained and in California,[11] which has adopted the most sweeping provision of this sort, the Supreme Court has not declared against the practice in any case which has come before it. The right of a court to request of the Department of Mental Diseases a mental examination of "any person coming before the court," even in a civil case, has been upheld in Massachusetts.[12] Objection has been made, however, and sometimes even by members of the judiciary, that judges may not be the authorities best fitted to select competent experts of integrity on the basis that they may

[6] People *vs.* Scott, 326 Illinois 327.
[7] People *vs.* Dickerson, 129 N. W. R. 199.
[8] Meek *vs.* Wheeler, Kelly & Hagny Inv. Co., 251 Pac. R. 184.
[9] Tugman *vs.* Riverside and Dan Cotton Mills, 144 Va. 473.
[10] State *vs.* Horne, 171 N. C. 787.
[11] Ch. 156, Acts of 1925 (Cal.).
[12] Mass. General Laws, Ch. 123, Sec. 99. See Sullivan *vs.* The Justices. Mass. Advance Sheets, pp. 1143-1145, May 30, 1930.

know little or nothing of the professional qualifications of the persons who are appointed. Again in at least one large American city nepotism and favoritism have been decidedly marked in the appointment of commissions of this sort and have resulted in a scandal not only over the incompetence of the men appointed but of the exorbitant fees paid. The most serious objection to this practice, however, is one which goes to the heart of the problem; namely, that in the selection of the persons to be examined under such a system there is no assurance that the defendant who is mentally ill will be recognized as such. The plea of insanity must be raised by the defense; this means that, as a rule, initiative will come from the attorney for the defendant who is, of course, not a trained medical man. He may on the one hand fail to recognize that his client is deranged mentally, and he may on the other hand introduce the plea, although he realizes that there is very little basis in fact for it. Other persons who may raise a question are the court officers, the jail officials, the judge and the district attorney. There is no assurance that any of these individuals will recognize the case for what it is nor is there any reason why they should be expected to do so. On the one hand we have specious pleas and on the other the considerable possibility that a person suffering from mental disease may be put on trial and may even be sentenced, even though he is so deranged mentally as to meet the legal test of insanity. In California, the introduction of the plea of insanity has been considerably complicated so that separate trial on the issue of sanity is held if the plea is introduced.[12] This procedure has been seriously criticized by at least one member of the Supreme Court of that state as being an infringement on the rights of the defendant.[13] In Colorado, the court is required, if the plea of insanity is introduced, to commit the patient to a state hospital for a period of 30 days.[14] In this manner, adequate observation by neutral and competent psychiatrists is assured, and it is reported that juries seem inclined in general to accept the findings of the hospital. A similar law was passed

[12] Ch. 677, Acts of 1927 (Cal.). Sustained in People *vs.* Hickman, 267 Pac. R. 909.
[13] See Dissenting Opinion of Preston, J., in People *vs.* Troche, 273 Pac. 767 and People *vs.* Fook, 273 Pac. 779.
[14] Ch. 90, Arts of 1927 (Col.).

in Louisiana in 1928,[15] with the additional provision that the findings of a commission established in the law to examine the defendant while he is in the hospital should be final. As a result of this latter provision, the law has been declared unconstitutional.[17] This plan of committing for observation in such cases is desirable but does not assure the recognition of the proper cases. The attempt of the State of Washington to limit the jury to fact-finding, leaving the determination of the defendant's mental condition to the court, was declared unconstitutional in 1910 in the Strasburg case.[18]

As a practical illustration of the manner in which psychiatry can aid in the administration of the criminal law and as an illustration of the manner in which most at least of the evils of expert testimony can be abolished, I would call your attention to what is now known in Massachusetts as the "Briggs' Law." This law was conceived by a prominent Boston psychiatrist, Dr. L. Vernon Briggs, and was enacted in 1921.[19] It presents an entirely new scheme of procedure and for this reason I take the liberty of presenting it to you in some detail. Briefly, the provision is that any person indicted for a capital offense and any person bound over to the Superior Court or indicted for any offense who has previously been convicted of a felony or been indicted more than once shall be reported to the Department of Mental Diseases of the state for a mental examination by two psychiatrists appointed by the department. Under the law these psychiatrists shall examine the defendant "with a view to determine his mental condition and the existence of any mental disease or defect which would affect his criminal responsibility." The report of the two examiners is forwarded to the clerk of the court in which the trial is to take place and it is accessible to the court, to the district attorney, to the counsel for the defense and to the probation officer of the court. In this manner an impartial examination is assured and further assurance is given that information is available concerning the members of the legal classes described in the statute. The fact

[15] Act, No. 17, Extra Session, 1928 (La.).
[17] State *vs.* Lange, 123 So. Rep. 639.
[18] 60 Wash. 106.
[19] Ch. 415, Acts of 1921 (Mass.). Now found amended as Ch. 105, Acts of 1929.

that this examination is made by "competent persons free from any disposition or bias and under every inducement to be impartial and to seek and ascertain the truth" has been judicially noted by the Supreme Court of the Commonwealth.[20] Further, the psychiatrists are selected by a professional branch of the state administration. As a practical matter, the counsel for the defense have cooperated fully in allowing their clients to be examined. The defendant is not deprived of his right, of course, to call in other experts, and could not constitutionally be so deprived. The fact, however, that the examination is a fair and impartial one has appealed to the defense counsel to such an extent that "battles of experts" are no longer witnessed in the courts of Massachusetts, at least in criminal trials where the issue of sanity is involved. The prosecuting officers have, of course, no inclination to prosecute defendants whom they know to be mentally deranged; they have recognized that the reports are impartial and have acted accordingly. Fortunately, under the laws of Massachusetts, commitment to a mental hospital may be made if a defendant is found to be suffering from mental disease, this commitment detaining him under court authority and providing that in the event of recovery he shall be returned to the court. In a few cases a *pro forma* verdict of "not guilty by reason of insanity" has been found by a jury on the motion of the district attorney. The Commonwealth has been fortunate in that in cases of homicide such a verdict carries a mandatory commitment for life to a mental hospital, similar to the English provision for "commitment at His Majesty's pleasure." The matter of the mental defectives I shall take up in speaking of disposition.

A few details concerning the practical operation of the law may be of interest. Up to October 15, 1929, 1114 cases had been reported to the Department of Mental Diseases. Of these, 844 or 75 8/10 per cent had been examined. The failure to examine some of these defendants has been due to the fact either that the defendant was on bail or for other reasons could not be located. In some instances bondsmen have produced the defendant for examination, but as the examination is not compulsory, a considerable number have been missed in this manner. In

[20] Comm. *vs.* Devereaux, 257 Mass. 391.

some cases, too, the courts have sentenced before an opportunity was given to make the examination. More and more, however, the courts are insisting upon having these reports before them before they dispose of the case. There have been practically no cases in which the attorneys for the defense have refused to permit their clients to be examined, thus demonstrating their confidence in the fairness of the administration of this law. Forty of the prisoners examined have been reported as definitely insane; that is, committable to a mental hospital. In 39 other cases, observation commitment has been recommended for purposes of determining definitely whether or not the prisoner is suffering from mental disease. Eighty-two prisoners have been reported to be mentally defective. A diagnosis of psychopathic personality has been made in 16 cases, that of epilepsy in one, and that of dull or borderline intelligence in nine. The total then of 178 or 21 1/10 per cent of the total number examined have been reported to be either frankly or suggestively abnormal mentally. In interpreting these figures one should bear in mind that this is a selected group of delinquents. For example, 351, or nearly 30 per cent of the entire number, were indicted for first-degree murder. This fact has been due to the failure in the early years of the law to report many of the non-capital cases which were included under the law, but with the perfecting amendments which have been added from time to time the proportion of capital cases has become steadily smaller. Some points of interest stand out particularly in these figures. First of all is the fact that only about one-fifth of all the prisoners examined were reported as abnormal. To be sure these examiners have been conservative and these figures present the lower limit. Yet they are certainly far from being in harmony with the doctrine which I cited in one of the opening quotations to the effect that crime is a result of mental deficiency. Another point of interest is that the number of frankly insane is relatively small, being only about 3 per cent of those examined, whereas 9 7/10 per cent of those examined have been found to be mentally defective, that is, feebleminded. Even though this is a considerable proportion, it is considerably under the figures of 20 or more per cent sometimes cited as representing the proportion of feebleminded in the criminal group. An additional advantage

of this law which might better be mentioned in connection with this disposition is the fact that in the cases of the defendants examined the court has before it by means of this examination a statement of the defendant's mental condition and through the probation department a considerable amount of material considering his previous history. No claim is here offered that the Briggs' Law represents the last word in the application of psychiatry to criminal law. It is, however, in spite of some defects which it would be difficult to correct in the present state of the law and the Constitution, one of the most progressive pieces of legislation of its sort yet enacted.[21]

I have dwelt at some length on the rôle which psychiatry plays in determining the responsibility and the triability of the defendant. In the days when the doctrines of the Beccaria were in full force, when the penalty for a given crime was fixed by law, it was sufficient for the court to know that a defendant was or was not insane, either at the time of the act or at the time of the imposition of sentence. The doctrine of individualization of penal treatment or punishment, however, is not particularly new. A century ago, for example, Francis Joseph Gall said, "These reflections will suffice to make each one sensible, that the measure of the culpability, and the measure of the punishment, should not be derived either from the matter of the illegal act or from any determinate punishment but solely from the situation of the individual acting."[22] Lombroso laid much emphasis upon the mental make-up of the offender and the fact that offenders differ much in their constitution and presumably therefore in the treatment which they should receive. The development of reformatories, of probation, of the indeterminate sentence, and of institutions for defective delinquents, is further evidence that criminal procedure today recognizes the principle to a certain degree at least of individualization of treatment. The growing discretion permitted to judges, except of course in the case of certain mandatory laws and in those states where

[21] For a further discussion of this law in action, see W. Overholser in "Psychiatry and the Massachusetts Courts as Now Related," Social Forces, Vol. VIII, No. 1, pp. 77-87, September, 1929.

[22] "On the Origin of the Moral Qualities and Intellectual Faculties of Man," Vol. 1. p. 276, Boston, 1835.

the penalty is set by the jury, has been given with but one purpose on the part of the lawmakers, namely, an attempt to make the punishment fit the criminal instead of the crime. Today, in fact, there seems to be a growing sentiment in legal circles that the functions of guilt-finding and of penalty-fixing have been too much confused. If they are essentially separate functions there is indeed a possibility that they should be exercised by different agencies of government. Former Governor Smith of New York proposed,[23] and many students of the law have likewise suggested, that it might be desirable to relieve judges entirely of the onerous duty of imposing sentence and that this duty should be exercised by a group of persons after scientific studies of the individual, of his capacities, and of his needs.

The thesis of psychiatry is a comparatively simple one. The psychiatrist looks upon the individual as such, recognizing in him a person with certain innate abilities and disabilities, molded by the environment to which he has been previously subjected and reacting to given situations in an individual way. A psychiatric evaluation of the patient is not satisfactory without a study of the individual and considerable knowledge of his previous life. Psychiatry is closely linked with applied sociology. It recognizes the fact that environment reacts upon the individual and that the individual reacts upon the environment, each modifying the other. In some cases, as, for instance, in frank mental disease, the mental symptom is the outstanding feature and often the cause of the offense. In the case of the mental defective, however, the difficulty is often fully as much environmental as constitutional. The majority of the mental defectives are not criminals by any means; certain ones of them, however, by reason of lack of training have undue susceptibility to suggestion and may be led into criminal acts. There is reason to believe that the proportion of mentally defective defendants is greater than is the proportion of feebleminded in the general population. They are not offenders, however, exclusively, because they are feebleminded.

The fact that a scientific knowledge of the mental constitution of the offender as well as knowledge concerning his previous

[23] N. Y. Legislative Document No. 3 (1928), pp. 53-54. A similar proposal was made by Sheldon Glueck in 1925. See *op. cit.*, pp. 485-487

history and environment is of assistance to the court in making disposition, is a fact which is coming to be recognized by a considerable number of judges. It has been put into practice by the establishment of court clinics in a moderate number at least of courts. Notable among these are the Recorders' Court of Detroit and the Supreme Bench of Baltimore. In 1928 the National Crime Commission conducted a survey of the country to ascertain to what extent psychiatry is being used by the criminal courts. Of 1168 courts of all grades of criminal jurisdiction including juvenile courts, 110, or 9 4/10 per cent, reported that they were served regularly by a psychiatrist either employed by the court on a full-time or part-time basis or furnished by some other public agent. These courts were distributed throughout 31 states and the District of Columbia. Of the judges replying to the questionnaires, 584 expressed an opinion as to the value of medical reports in the disposition of cases. Of these, 473, or 81 per cent, were frankly favorable, expressing the belief that the usual manner of dealing with offenders is unscientific, and that knowledge of the defendant's mental and physical condition is not only more humane to the defendant, but accomplishes better the desired ends of justice and the protection of society. If time permitted you would be interested to hear the comments which some of these judges made. A number of the comments were reproduced in the original report of the survey, published in "Mental Hygiene" for October, 1928.[24]

The psychiatrists believe, with many judges, that stress should be laid more than is the case at present upon the general security of society. It seems almost obvious that a system which provides for the frequent appearance in court of individuals who after receiving a short sentence promptly return to court again, is doing but little either in the line of protecting the community or reforming the offender. The psychiatrist is inclined to disregard the act alleged, preferring to lay stress upon what may be termed the social formidability of the offender. I might cite here the case of an Italian whom I had occasion to

[24] See W. Overholser, "Psychiatric Service in Penal and Reformatory Institutions and Criminal Courts in the United States." Mental Hygiene, Vol. XII, No. 4, pp. 801-839, October, 1928. "Use of Psychiatric Facilities in Criminal Courts in the United States." Mental Hygiene, Vol. XIII, No. 4, pp. 800-808, October, 1929.

examine a few years ago. This man had for over five years been suffering from a definite psychosis, so marked that his fellow-workers, his landlady and his family realized that he was far from well mentally. He had annoyed a certain girl considerably by following her and upon her complaints to the police he was finally arrested and charged with loitering, one of the most trivial offenses known. He was brought into court but nothing seems to have been brought to the attention of the judge by the police concerning the peculiar manner in which he had been loitering. In any event, no suggestion was made that he might be a mental case and as a result he was fined a small amount and released. After this experience his delusions gained in intensity and became centered upon the police, with the result that within a year he shot and killed two police officers. Here we have the case of a man who was a dangerous person and yet who, because of the fact that his original offense was considered a "trivial" one, was dealt with in the routine manner with a small fine; whereas, even the most casual mental examination would have shown that he belonged in a mental hospital. It is interesting to note in this case, as well, that the attorney who was appointed for him by the court apparently did not recognize until after the examination under the Briggs' Law that his client was mentally ill.

That mental disease and defect are not confined to the serious offender has been shown well, too, in a recent study of 100 traffic offenders in the Recorders' Court of Detroit.[25] Twelve of these were definitely feebleminded, 42 were of inferior intelligence and one was definitely insane, while one was an epileptic. Numerous cases might be cited here of psychotic tramps who have been sentenced to six months and then released, only to be again picked up by the police, finally perhaps being recognized and committed to a mental hospital. The injustice to these individuals as well as the failure to prevent them from annoying society hardly needs elaboration. Another case is of some interest as illustrating the point that the psychiatrist does not always insist upon a less severe sentence than would ordinarily be meted out. Recently a young man who had formerly been an

[25] T. Raphael and Other, "One Hundred Traffic Offenders," Mental Hygiene, Vol. XIII, No. 4, pp. 809-824, October, 1929.

inmate of the schools for the feebleminded and who had been examined in 1927 and diagnosed then as mentally defective was again before the court and was again reported as mentally defective. His commitment as a defective delinquent had been advised in both of the examinations, but in spite of the earlier reports and a long record which now totals 25 arrests he had been sentenced to three months in the House of Correction. In the present case he was given a long sentence in a state prison. He is, of course, at last segregated, and perhaps the same result has been brought about as if he had been committed as a defective delinquent. What shall be said, however, of the result if the original advice in 1927 had been followed? It seems quite likely that the subsequent record, involving as it did depredations upon society, could have been avoided. There is every reason to believe that if psychiatric advice were followed many individuals who now receive relatively short sentences would be permanently segregated. It may not be too heretical to suggest that one feature which stands in the way of adoption of this advice is the tradition of punishment as such, disregarding the ultimate protection of society. The psychiatrist, in fact, hardly fits in with the general notion of him as a "coddler" of the criminal. It may be safely said that one of the chief criticisms of the law which the psychiatrist can offer would be that it is too lenient with some of the offenders and of course too severe with others, the main difficulty being that the punishment imposed is too likely to be based upon the name of the crime rather than upon the character of the man committing it.

A brief discussion of the various types of mental abnormality found among offenders may not be out of place. First of all we have the various types of frank mental disease, the psychoses. It is this group which is meant when the term "insane" is generally used. "Insane," however, is of course primarily a legal term and is not one which is used by psychiatrists. There are numerous types of mental disease, all of which may present varying degrees of severity and all cases of which have their own individual peculiarities. On the one hand, we have the organic types, those represented by brain injuries, brain tumors, infections of the brain such as general paresis and encephalitis and those due to senile and arterio-sclerotic changes. Many of

these organic types in the early stages show disturbances of conduct without definite intellectual impairment, the disturbance being largely in the emotional field and exhibiting itself in the lack of inhibition. Lack of judgment is early found and the individual may commit unusual acts. The question arises in some of these cases, as, for example, carnal abuse, whether the mental disorder is sufficient to warrant a finding of legal "insanity." On the other hand, we have the so-called functional disorders, those which have no known organic basis. These account for a large proportion of the admissions to our state hospitals and one of them, dementia præcox, accounts for more than one-half of the patients in our state hospitals at any one time. Among other mental disturbances of milder grade are the neuroses among which we find, for example, the compulsions. In a case of this sort the patient may truly have an irresistible impulse to do something which he fully knows is wrong. To be sure cases of true irresistible impulse are probably comparatively rare as they affect individuals who are brought before the bar of justice but they do, nevertheless, exist and are well recognized by psychiatrists. It is the existence of cases of this sort which is responsible for much of the criticism on the part of psychiatrists of the so-called "right and wrong" test. How large a proportion of offenders are frankly psychotic or suffering from a severe neurosis is difficult to say. Dr. Bernard Glueck in his work at Sing Sing reported approximately 12 per cent of the prisoners studied to be mentally diseased or deteriorated. The proportion in our county jails is probably less. In Massachusetts, on the basis of careful studies of 4576 prisoners serving sentence, the diagnosis of a psychosis or neurosis was made in 3 2/10 per cent of the cases. It should be borne in mind that the numbers found in the penal institutions represent only those which escape the attention of the court. In a study of the Massachusetts statistics it was found that over a period of 13 years 11 per cent of the persons indicted for murder were found by the court to be insane. Very few, of course, of these ever reached a penal institution, the most of them being committed directly to a hospital. The existence of even 3 or 4 per cent serves to indicate the desirability of some sort of mental examination before dis-

position. The injustice and impropriety of sending a mentally ill person to a penal institution are obvious.

Much has been said concerning mental defect as a cause of crime. We heard rather more of this in the heyday of mental testing than we do at present, but it is a fact that, as in the general population, mental defectives are found among offenders only probably in somewhat larger proportions. How much this is due to the fact they are less well provided with this world's goods, have less influence and are less clever in evading the police, is an open question. Again the figures vary somewhat, running from 28 1/10 per cent as reported in the Sing Sing study to 7 2/10 per cent as found in the study of the county jail population of Massachusetts. In addition to the mental defectives there are the prisoners of borderline or low normal intelligence who are below the average but not frankly defective. There is a small proportion of the mental defective group, persons who are actively anti-social and who present a rather serious problem, probably on account of the fact that they are, in addition to being mentally defective, psychopathic. This is the so-called defective delinquent group, one which is sufficiently important to have warranted New York and Massachusetts in establishing institutions for the special care of these individuals and Pennsylvania and New Jersey in adopting similar legislation. The defective delinquent group, especially, is a group which is unamenable to penal treatment, and embraces a considerable number who may be considered unreformable. It would appear that the law, at least in Massachusetts, which provides for an indeterminate commitment after a finding of this status, might be interpreted as recognizing a partial responsibility rather than a total lack of it or its existence in an undiminished state.

Much has been written and spoken about the criminal psychopath. There is a group of individuals not necessarily psychotic, not necessarily feebleminded, who are nevertheless emotionally unstable, impulsive and egocentric. It is to this group that we apply the term psychopathic personality. Many of these individuals are socially useful, but some become criminals and are definitely dangerous persons. The problem is so serious that in 1925 the State Commission of Prisons of New York published

a special report on the psychopathic delinquent,[26] urging the establishment to which psychopaths who are confirmed criminals and dangerous and segregable can be committed directly by the court and held in custody as long as they are unfit to return to society. Many of these individuals are distinctly unreformable and it would seem that some disposition of this sort would be highly desirable. Unfortunately, the diagnosis of the psychopath is not always easy and the standards by which they are judged are not uniform. It is likely that further developments along the line of their special treatment must wait until psychiatrists are more closely in agreement on the matter of diagnosis. It is interesting to note in this connection that in Holland and Norway this group may be permanently segregated.

The courts have not always recognized that drug addiction is quite frequently an indication of an underlying personality defect, possibly of a psychopathic personality, and that it is in many ways a medical as well as a legal problem. There is very little evidence that the drug addict is a serious criminal problem. In the 4576 cases studied in the Massachusetts county jails, for example, only 53, or 1 1/10 per cent, were found to be drug addicts and of these 34 were serving sentence for violation of the narcotic laws; that is, essentially for the crime of being drug addicts! Of the rest, 11 had been committed for larceny, the offense usually being prompted by the need for more of the drug. So long as drug addiction is looked upon solely as a misdemeanor to be treated by relatively short sentences, so long may we expect addicts to return to the use of the drug as soon as they are released. In a few states a limited form of indeterminate commitment for treatment is in force. Drug addiction is essentially a symptom, rather than a cause.

The problem of alcoholism is a related one and is one which certainly is not being satisfactorily dealt with at the present time. The presence in our court of persons who have been arrested 25, 50, or more times and who have been given a short sentence, only to celebrate their release by again becoming intoxicated, is ample evidence of the fact that something is wrong

[26] Published by New York State Commission of Prisons, December 1, 1925.

with the present system. It may well be that it is the best system that is practical but one may perhaps be pardoned if he doubts it.

Such then are some of the types of mental deviations which may be met in the court. In all they constitute a very considerable proportion of the number of offenders coming before the bar. It would seem reasonable to suggest that some of these groups at least might be identified in the court and disposed of in some other manner than by sentence to a penal institution. Some of them for example are hospital cases, while others would classify properly in an institution for defective delinquents where they could be segregated until such time as they are fit to be released. Such release then, of course, should be conditional. The defective delinquent laws already in force in Massachusetts and New York point the possible way for a wider extension of the principle of indeterminate segregation. It will probably be alleged in objection that in many instances the judge even knowing the peculiarities of the defendant cannot exercise sufficient discretion or cannot find the suitable institution for the defendant. This is all too true; even though some judges, by straining the elasticity of their discretion, are sometimes able to bring about the disposition they think best. If by the existence of psychopathic clinics in the courts judges could demonstrate the fact that many distinctly abnormal persons calling for special treatment were passing before them, it seems highly probable that the necessary supply of institutions and the latitude of judicial discretion would be provided by the legislature. Such clinics should be manned by well-trained personnel, properly remunerated, and assured of stability and freedom from political pressure. A wider extension of judicial discretion, an extension of the principle of the indeterminate sentence, the further development of probation and parole, and a greater variety of institutions, or at least facilities for classification, are desirable corollaries of the establishment of means whereby the courts may know something of the material with which they are dealing.

The existence of preventive activities in the psychiatric sphere may be touched upon in passing. There is a widespread conviction in psychiatric circles that many of the faulty mental adjustments made in later life are due to the existence of faulty

habits in childhood. The child guidance movement has become widespread in this country and seems to offer a possibility that at least some mental disorders may be prevented. The existence of school clinics which serve to identify the backward children and those otherwise needing psychiatric attention, and the existence of special classes which will provide training for the backward in accordance with their needs, may be expected eventually to reduce to some extent the likelihood that the children in this group will develop difficulties with the law.

In making the statements which I have in this paper I have attempted to avoid dogmatism. It may be that psychiatry is, as has sometimes been said, claiming to accomplish more than the facts warrant. The disagreements among psychiatrists are often cited as arousing suspicion of their knowledge of the subject. Although it is a fact that various schools of thought exist among students of the mind, it should be remembered that this is merely an indication of the active growth of a young science. Further, psychiatrists are in general agreement upon the symptoms of mental disease and their significance; it is chiefly upon the causation of these symptoms, upon mental mechanisms, that they differ. Several courts in this country have had for a considerable period psychopathic clinics and these have been functioning for a sufficient period of time to warrant the drawing of conclusions. A study of the practical result of the operation of these clinics and a valuation of their pragmatic value might be highly desirable. I venture to suggest that the Social Science Research Council or some similar organization might be interested to make an impartial study of the matter. This study should be made, perhaps, with psychiatric advice but certainly should not be made exclusively by psychiatrists as they would probably be accused of bias. This Section possibly through your Committee on Psychiatric Jurisprudence might well be called upon to assist in such a survey. Psychiatrists would welcome such a study, and I feel sure that an organization such as this, which is interested in safe and sane progress, would likewise appreciate having the assurance of some group not too strongly tainted with the odor of psychiatry.

To sum up, we may say that psychiatry takes the position that the offender is an individual with his own peculiar make-up

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To sum up, we may say that psychiatry takes the position that the offender is an individual with his own peculiar make-up

and history, that his reactions therefore to given situations are individual; that in a measurable proportion of cases these reactions may be termed, from a psychiatric point of view, abnormal; that the line between "normal" and "abnormal" cannot be sharply drawn; that in some instances the existence of these abnormalities may call for what is generally termed lenient treatment, but that, on the other hand, these abnormalities may indicate the existence of dangerous tendencies, anti-social and undesirable, calling for special treatment and for segregation; that segregation whether for the frankly abnormal or not should be made a matter of individual study and that release should be dependent upon reasonable proof that the individual is a safe person to be at large; that a proper disposition of criminal cases depends upon scientific knowledge of the offender and his history; that this aid can best be rendered by a psychopathic clinic attached to the court, or at least a psychiatric service which is available to the court under public auspices; that the so-called "tests of insanity" are antiquated and out of line with modern and generally accepted psychiatric teachings and that they are unfair in many instances to the defendants; that a provision should be made for the permanent segregation of criminals who by reason of their mental constitution represent menaces to society; that persons acquitted by reason of insanity should not be allowed to go at large but should be detained in a proper institution until recovery. It is the belief of present-day psychiatry that these principles will conduce to a greater degree of true justice to the defendant and, perhaps even more important, to a greater degree of protection of society.

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